United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7475

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P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JOSEPHINA DUCHESNE, as administratrix of the estate of Pauline Perez, et. al.

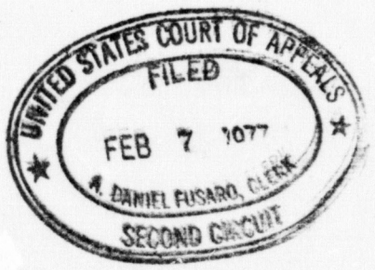
Plaintiffs-Appellants

-against-

JULE M. SUGARMAN, et. al.

Defendants-Appellees

APPELLANTS' BRIEF



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PRELIMINARY STATEMENT

This is an appeal from an order dismissing the complaint against Defendants-Appellees, Jule M. Sugarman; Elizabeth Beine; Seymour Fass; and James R. Princeler, and from an order dismissing the first and second cause of action against Defendants-Appellees New York Foundling Hospital Inc., and St. Joseph's Home of Peekskill. These orders were entered on April 26, 1976 and April 28, 1976 respectively by the Honorable Charles M. Metzner, United States District Judge, Southern District of New York. The order dismissing the complaint against Defendants Sugarman, Fass and Beine is only recorded on the docket sheet of the record on appeal. There is no written opinion. The order and opinion dated April 26, 1976 is unreported and it is reproduced at page 43 of the Appendix.

ISSUES PRESENTED FOR REVIEW

1. Whether Defendants-Appellees violated Plaintiffs-Appellants' constitutional right to live together as a family where Defendants-Appellees took custody of infant appellants and maintained this custody for over two years without court authorization, and without affording appellants the benefit of a hearing?

2. Whether Defendants-Appellees Sugarman, Beine, and Fass are liable for the denial of appellants' constitutional right without due process?

3. Whether the complaint sets forth a cause of action under New York Law ?

STATEMENT OF CASE

This is an action pursuant to 42 U.S.C. §1983 seeking declaratory relief and damages to redress the deprivation under color of state law of rights, privileges, and immunities secured by the Constitution of the United States. This action was commenced in August, 1972.

The Plaintiffs-Appellants are Pauline Perez, the mother of infant appellants Daniel Cruz and Marisol Lopez. While this action was pending, Plaintiff Perez died. Plaintiff Josephina Duchesne, the mother of Pauline Perez, has been substituted to proceed on behalf of the estate of Pauline Perez and on behalf of the infant plaintiffs.

The Defendants-Appellees are: Jule M. Sugarman who was the New York City Commissioner of Social Services and who was responsible for the care and custody of infant plaintiffs; Elizabeth Beine, the Director of the New York City Bureau of Child Welfare who was responsible for operating and supervising the child welfare system in the City of New York which took custody and responsibility for infant plaintiffs; Seymour Fass, the Director of Manhattan Bureau of Child Welfare and who was responsible for operating the child welfare system in the borough of Manhattan which took custody and responsibility for infant plaintiffs; James R. Princeler, a case supervisor of the New York City Bureau of Child Welfare, Manhattan Office, and who supervised and was responsible for the individual who took custody of infant

plaintiffs; New York Foundling Hospital which assumed and retained custody of Plaintiff Lopez; and St. Joseph's Home which assumed and retained custody of Plaintiff Cruz.

The substance of the complaint is that Defendants assumed custody of the infant plaintiffs Cruz and Lopez, and continued this custody from December 16, 1969 until March 7, 1972 without plaintiff's Perez's consent and without any lawful authority, and without affording Plaintiffs a hearing. Defendants' detention of the infant plaintiffs was in violation of Plaintiffs' constitutional rights and in violation of the New York Social Services Law and the New York Family Court Act.

On August 9, 1972, the Honorable Arnold Baum, United States District Judge, Southern District of New York, granted in forma pauperis status to this action in the District Court.

In an order dated March 13, 1973, the District Court dismissed the within action against Defendants New York Foundling Hospital and St. Joseph's Home on the ground that there was no state action. This dismissal was appealed. In an order dated June 6, 1974 in the case of Perez v. Sugarman, 499 F.2d 761 (2nd Cir., 1974), this court held that there was state action and the case was remanded.

A trial was conducted in the District Court on April 21-26, 1976. Before the conclusion of the trial, the District Court dismissed the action against Defendants Sugarman, Beine and Fass. In an order dated April 26, 1976, the District Court dismissed counts 1 and 2 of the complaint against Defendants New York

Foundling Hospital and St. Joseph's Home. Only one charge was submitted to the jury - an intentional tort claim. On April 26, 1976, the jury rendered a verdict for Defendants on this claim.

Plaintiffs filed a Notice of Appeal on May 24, 1976. On May 26, 1976, Plaintiffs filed a motion with the trial judge for leave to obtain a transcript without cost. In an order dated July 14, 1976, the Honorable Charles M. Metzner denied Plaintiffs' application for a trial transcript.

In an order dated September 30, 1976, this Court granted Plaintiffs leave to perfect this appeal with a Statement of Evidence in lieu of a trial transcript and directed that Plaintiffs' Brief be filed within two weeks after the approval of the Statement of Evidence(hereinafter Statement).

STATMENT OF FACTS

Plaintiffs did not testify at the trial of this action. Plaintiff Perez died on December 30, 1975, four months prior to the trial. Plaintiffs Cruz and Lopez were young children, 7 years and six months, respectively, at the time that they were removed from Plaintiff Perez's custody. Because of their tender years, and because of the recent death of their mother, Plaintiffs Cruz and Lopez did not testify.

Since Plaintiffs were unable to testify at the trial, and because six years had elapsed since the conduct complained of, Plaintiffs were required to rely extensively on agency records

and the testimony of Defendants to establish their prima facie case. The evidence adduced from the agency records is a mosaic which viewed as a whole and in connection with the testimonial evidence, establishes Plaintiffs' case.

Plaintiff Cruz (hereinafter "Danny") and Plaintiff Lopez (hereinafter "Marisol") were 7 years and 6 months, respectively, on December 16, 1969 when they were last in the custody of their mother, Plaintiff Perez. Prior to December 16, 1969, Danny and Marisol lived in New York City with Plaintiff Perez. The records and evidence* introduced at trial show that Plaintiff Perez was a good homemaker who managed money reasonably well[1] and gave her two children the maternal care and affection which they required.[2]

Daniel attended P.S. 15 on East 4th Street; he was a good student and his attendance record was good.[3] Plaintiff Perez walked Danny to and from school each day.[4] Plaintiff Perez had taken both Danny and Marisol to neighborhood clinics for health care and vaccinations.[5]

Late on the night of December 15, 1969 or early in the morning of December 16, 1969, Plaintiff Perez felt that she was ill and was in the need of medical attention. She took her two children to the home of Lily Lopez, a friend and neighbor who lived in the same apartment building, and with whom Plaintiff

---

* A list of footnotes for the references to agency and medical records is attached at the end of Plaintiffs' Brief.

Perez had regularly shared babysitting responsibilities.[6] Plaintiff Perez asked Ms. Lopez to care for her children while she went to the hospital for assistance. Plaintiff Perez expected that she would receive out-patient care and return to her children that same day.[7] On December 16, 1969, laintiff Perez was admitted to Bellevue Psychiatric Hospital where she remained for the next six days.[8] On December 16, 1969, the New York City Bureau of Child Welfare (hereinafter "BCW") was informed that Lily Lopez could not continue to care for Danny and Marisol because she was expecting a child at any moment.[9] On December 17, 1969, an employee of BCW went to Bellevue Hospital and spoke with Plaintiff Perez. The BCW employee found that Plaintiff Perez was under medication and agitated during the discussion regarding the childrens' custody. The BCW employee asked Plaintiff Perez to sign a paper consenting to placement of her children. Plaintiff Perez refused, and she told the BCW employee that she did not want to sign any paper and that she wanted her mother, Josephina Duchesne, to take care of her children while she was in the hospital.[10] The BCW employee noted in the record that he attempted to mollify Plaintiff Perez's fears and explained "that she would not lose any rights as mother and that as soon as she came out of the hospital, she could have the children back when she was able to provide proper care."[11] Despite these representations,[12] Plaintiff Perez refused to sign the consent.

The BCW employee than called his supervisor, Defendant

Princeler, and reported that Plaintiff Perez refused to sign the consent to placement. Defendant Princeler told the employee that that was all right at that point.[13]

The BCW record notes that the employee contacted Josephina Duchesne, and that she was going to Puerto Rico, and was unable to accept custody of the children at that time. Mrs. Duchesne, according to the BCW record, told the BCW employee that she would like to take the children when she returned in a few weeks from Puerto Rico if she could make the necessary arrangements with her job. At the trial, Mrs. Duchesne testified that she did not go to Puerto Rico in December 1969, and that the BCW employee did not come to her home on December 17, 1969 (Statement, p. 14, 8-9). The Bellevue Hospital record confirms the fact that Mrs. Duchesne was not in Puerto Rico at Christmas time in 1969 because it notes:

> Patient does have relatives come to see her - mother, uncle . . . (Exhibit 3, Bellevue Record, Social Service Medical Record dated December 31, 1969).

Moreover, since Mrs. Duchesne is Spanish-speaking, and since Mr. Princeler testified at trial that the BCW employee did not speak Spanish, it is unlikely that Mrs. Duchesne could have communicated with him concerning the information set forth in the BCW record.

On December 17, 1969, BCW assumed custody of Danny and Marisol and on that same date St. Joseph's Home of Peekskill (hereinafter "St. Joseph's") assumed custody of Danny and Defendant New York Foundling Hospital (hereinafter "Foundling Hospital")

assumed custody of Marisol.

On December 22, 1969, six days after she had been admitted, Plaintiff Perez was released from Bellevue Psychiatric Hospital.[14] On that day, she went immediately to the office of BCW and was interviewed by Richard Herstein, a case worker who was supervised by Defendant Princeler. The BCW record notes that Plaintiff Perez was bright, alert, genuinely concerned about her children and stated that she would like her children returned.[15] Plaintiff Perez was told by the BCW case worker that the return of her children would depend on the recommendation of her doctor.[16] The BCW case worker told Plaintiff Perez that it might be advisable for her children to remain in placement. The BCW record indicates that there was a question as to whether Plaintiff Perez agreed to continued placement. On the Psycho-Social Summary, dated February 2, 1970, which BCW prepared and sent to Defendants Foundling Hospital and St. Joseph's, there is a recommendation that Danny and Marisol be placed in foster care. It is evident that Plaintiff Perez did not authorize continued placement because on page 3 of the Psycho-Social Summary under the section "Plan For Family", it is noted that "Miss Perez is in agreement ? with this plan until doctors state she is able to care for the children."[17] At the interview on December 22, 1969, Plaintiff Perez was informed that Marisol was at the Foundling Hospital and that Danny was at St. Joseph's which is located in Peekskill, New York, which is about 30 miles from New York City. Plaintiff

Perez said that she would like to visit her children, and that she would visit Marisol at the Foundling Hospital in New York City, but that she was concerned about visiting Danny because of the expense and the distance involved in traveling to Peekskill.[18]

On December 23, 1969, Plaintiff Perez went to the Foundling Hospital to visit Marisol. She was accompanied by Mrs. Guillermina Perez, Marisol's paternal grandmother.[19] At this first meeting, the Foundling Hospital concluded that Plaintiff Perez was "happy-go-lucky in attitude, unpressured, and unlikely to suffer for the sake of being responsible."[20]

On December 26, 1969, Plaintiff Perez voluntarily returned to Bellevue Psychiatric Hospital.[21] She had been upset and depressed by the absence of her children.[22] Plaintiff Perez remained in the hospital until early February, 1970, when she was discharged.[23]

On January 15, 1970, Ms. Colonna, a case worker at St. Joseph's, went to Bellevue Hospital to see Plaintiff Perez. Josephina Duchesne was also present in the hospital at this time. Josephina Duchesne requested permission to have Danny come to live with her.[24] She was unable to take both children because she worked and because she also cared for her elderly parents who were in their eighties.[25] Evidently, Defendants denied Mrs. Duchesne's request for custody of Danny, but nowhere in the extensive and detailed records is there any indication that Defen-

dants notified Mrs. Duchesne of their decision.

On February 11, 1970, Plaintiff Perez was discharged from Manhattan State Hospital where she had been transferred from Bellevue. Shortly after her release from the hospital, she began to attend Lower Manhattan Aftercare Clinic as an outpatient.[26] She went to this clinic once a month. The Lower Manhattan Aftercare Clinic record (A at p.65) demonstrates that Plaintiff Perez attended regularly, was polite and coherent, and that her main complaint and problem was that she wanted her children to be returned.[27] The record demonstrates that between February 1970 and April 1970, Plaintiff Perez visited her children, and attended Lower Manhattan Aftercare Clinic. During this period, Plaintiff Perez visited Marisol at the Foundling Hospital approximately once a week, and she was often accompanied by relatives.[28] Plaintiff Perez also visited Danny, but her visits were less frequent due to the distance involved.

Upon Plaintiff Perez's release from the hospital in February, 1970, she went to the Foundling Hospital and requested return of Marisol. Plaintiff Perez told the Foundling Hospital that she hoped to remain well: "I'm not gonna (sic) go back to the hospital, I'm gonna try . . . . I'm gonna do my best."[29] At this interview, the Foundling Hospital noted that Plaintiff Perez seemed "maudlin" and concluded that "if nothing else, Miss Perez retains some unrealistic hope in the face of an objectively bleak future. Even if others are led to believe her cause is lost, the mother is still groping."[30]

Plaintiff Perez also met with St. Joseph's after she was released from the hospital. The record indicates that St. Joseph's had an "unfavorable opinion" of Plaintiff Perez and concluded that Plaintiff Perez desired "the children merely as love objects," and assessed Plaintiff Perez to be "sweet, but not mother material."[31] On April 29, 1970, the psychiatrist at the Lower Manhattan Aftercare Clinic (Ans p.45) sent a letter to Defendant Princeler at BCW and advised that Plaintiff Perez was well enough to function as a mother and the psychiatrist recommended that her children be returned to her one at a time.[32] According to the BCW case record, no action was taken upon receipt of this letter until approximately two weeks later when Plaintiff Perez telephoned to inquire whether the psychiatrist's letter had been received.[33] The BCW case worker who spoke with Plaintiff Perez acknowledged receipt of the letter and arranged to make a home visit the following day.[34]

On May 12, 1970, the BCW employee visited Plaintiff Perez's apartment and found her home to be neat and adequate despite the deteriorated condition of the building.[35] During this home visit, Plaintiff Perez requested that her children be returned.[36] Plaintiff Perez reported that her father and brother who lived in the neighborhood would help her with the children.[37] The BCW worker told Plaintiff Perez that she was not sure whether the children would be returned, but she suggested that perhaps it would be wise to return just one child at a time.[38] The BCW worker's opinion concurred with the psychiatrist's recommendation.

The worker advised Plaintiff Perez that BCW would check with St. Joseph's and Foundling Hospital. Plaintiff Perez was told to telephone BCW several days later to learn whether the children would be returned.

After this home visit, BCW telephoned Founding Hospital to advise that the psychiatrist had reported that Plaintiff Perez was competent to carry out her maternal responsibilities.[39] Foundling Hospital told BCW that it was opposed to returning Marisol and advised BCW that the children could not be returned without obtaining the approval of St. Joseph's which had major case work responsibility for the two children.[40] Foundling Hospital objected to the return of Marisol because she was not toilet trained and was still on a formula and would be a lot of trouble for Plaintiff Perez.[41]

BCW telephoned St. Joseph's and reported that the psychiatrist had recommended return of Plaintiff Perez's children. St. Joseph's opposed the return of Danny because St. Joseph's would "hate to see his schooling interrupted by discharge" to Plaintiff Perez.[42] St. Joseph's also reported that Plaintiff Perez wanted the children returned because she was lonely, and that was not a good reason to discharge the children.[43]

On May 15, 1970, Plaintiff Perez telephoned BCW to learn whether her children would be returned. BCW advised Plaintiff Perez that the children would not be returned at that time and asked Plaintiff Perez to keep in contact with St. Joseph's which

would plan for the return of the children.[44]

During the remaining half of 1970, Plaintiff Perez continued to visit Marisol approximately once a week and she continued to visit Danny.[45] Also during this period, Plaintiff Perez repeatedly requested that her children be returned.[46] In or about April, 1970, Plaintiff Perez arranged to have her father, Miguel Perez, come from Puerto Rico to New York City to assist her in obtaining the return of her children.[47] After Miguel Perez came to New York City to help his daughter with the children, he went with her to meet with St. Joseph's[48] and the Foundling Hospital.[49] Miguel Perez was a stable man who was employed, and he had a close relationship with Plaintiff Perez and saw her frequently, sometimes daily.[50]

In June, 1970, Danny had a home visit with Plaintiff Perez. This was the first time Danny had been home since he had been removed from his mother's custody six months earlier. The visit went well.[51] In August, 1970, Danny made a second home visit to Plaintiff Perez. This visit also went well, and both Danny and Plaintiff Perez wanted Danny to stay at home.[52]

During the two years that Foundling Hospital held Marisol without court authorization, Marisol never was allowed to make a home visit to Plaintiff Perez. In June, 1970, Plaintiff Perez asked Foundling Hospital for permission to have Marisol make a home visit.[53] Foundling Hospital told Plaintiff Perez that since St. Joseph's had major case work responsibility for the

children, Plaintiff Perez would have to ask St. Joseph's for permission to have Marisol for a home visit.[54] When Plaintiff Perez asked St. Joseph's for permission to have Marisol for a home visit, St. Joseph's told Plaintiff Perez that it could only arrange home visits for Danny but not for Marisol.[55] According to the agency records, Marisol never came home during the over two year illegal detention complained of in this action, and during this two-year period, Danny and Marisol never had an opportunity to visit with each other or with Plaintiff Perez jointly.

In September, 1970, St. Joseph's planned to return Danny to the custody of Plaintiff Perez.[56] There is no indication in the agency records that St. Joseph's either sought or obtained the approval of BCW for the plan to return Danny to the custody of Plaintiff Perez. At the last moment, St. Joseph's cancelled its plan to return Danny because he expressed hesitancy and fear just prior to the day he was to be returned home.[57]

Plaintiff Perez was very sad and depressed when the plan to return Danny was cancelled. A short time after St. Joseph's cancelled the plan to return Danny, Plaintiff Perez voluntarily entered Bellevue Hospital in October, 1970. The Continuation Record for this admission notes:

> Pt. is a pleasant easy going young woman who smiles readily and relates well. Responses to questions show coherent and relevant thinking . . . .
>
> Imp. Mild paranoid schizophrenia - this woman's situation is exacerbated by conflict

> with her man over marriage and her desire to have her children at home . . . . (Exhibit 3, Bellevue Record, Continuation Record dated October 31, 1970) (A. at p. 63)

The hospital record also shows that Plaintiff Perez had been hoping and planning for the return of her children:

> The patient has three children: Daniel Cruz, 8, at Peekskill Home, a daughter 6 years old living with patient's grandmother in P.R., and a daughter 1-1/2 years old presently at New York Foundling Hospital. Patient expresses desire to have her children with her and had recently made arrangements through Welfare to move to a larger apartment on East 4th Street, near her mother, where she could care for the children. (Bellevue Hospital Record - Exhibit 3 - Continuation Record, 11/2/70).[58]
>
> . . .
>
> She is presently concerned about marrying her man and about her children and wishes to have them back with her (1 in PR, two in Catholic Homes). (Bellevue Record - Exhibit 3 - Continuation Record, dated Nov. 4, 1970).

Marisol remained at Foundling Hospital for almost two years, from December 1969 until September 1971, when she was transferred to a foster home. During this two-year period, the Foundling Hospital records show that Plaintiff Perez visited Marisol approximately once a week. During the Summer of 1971, St. Joseph's and Foundling Hospital decided that Marisol should be transferred from the hospital nursery to a foster home.[59] There is no indication in the record that Plaintiff Perez was informed of the plan to transfer Marisol to a foster home. Marisol was transferred to a foster home on September 13, 1971.[60] Plaintiff Perez

had visited Marisol at Foundling Hospital the day before Marisol was transferred to the foster home, but Foundling Hospital did not inform her that the transfer would occur.[61]

On September 28, 1971, Plaintiff Perez gave birth to a son, Edward.[62] Due to the birth of this child, Plaintiff Perez did not go to visit Marisol until October 18, 1971. Plaintiff Perez was accompanied on this visit by her brother, Hector Perez, and by her son, Edward.[63] When Plaintiff Perez arrived at Foundling Hospital, she was informed by an English-speaking employee that Marisol was no longer there, but that she had been transferred to a foster home.[64]

Plaintiff Perez did not understand the nature of foster care and she thought that Marisol had been adopted; she became very upset and told Foundling Hospital that they had no right to place Marisol in foster care and that she had never signed any papers of consent.[65] When Plaintiff Perez later met with Mr. DiScipio, the Foundling Hospital case worker, he admitted that she should have been apprised in advance of Marisol's transfer.[66] Plaintiff Perez had informed the Foundling Hospital that she had never signed any papers consenting to its custody of Marisol and Plaintiff Perez warned that she would go to court.[67] When Plaintiff Perez was next permitted to visit Marisol, she attempted to take the child home with her, however, Foundling Hospital forcibly stopper her.[68] The police were called on this occasion and Plaintiff Perez was very upset.[69]

A few days after Foundling Hospital prevented Plaintiff Perez from taking Marisol home she was readmitted to Bellevue Hospital. The Admission Record, dated November 11, 1971, notes:

> Current problems stem from her confusion over what is happening with her 2 yr. daughter, Marisol, whom she apparently placed for adoption without being aware of it.
>
> * * *
>
> Plan: Admit for evaluation: Some Social Service support and clarification of issue with child would be helpful. This action will forestall a serious suicidal threat at this time in this woman who obviously cannot cope with current situation.
> (Exhibit 3, Bellevue Record, Admission Record, dated November 11, 1971)(A at p.64).

From the hospital record, it is clear that Plaintiff Perez was upset and depressed about Marisol.[70] The record demonstrates Plaintiff Perez's fear that Marisol had been placed for adoption:[71]

> The patient expresses her main problem as confusion and anxiety over the disposition of her 2 yr. daughter, Marisol. The child is being put up for adoption, but she denies agreeing to this. (Bellevue Hospital Record - Exhibit 3 - Continuation Record, dated November 11, 1971).

The hospital record notes that Plaintiff Perez stated that Marisol's social worker was Mr. DiScipio and that:

> Then in a reference to Mr. DiScipio, she said, "People are trying to stop my life when I feel good." (Bellevue Hospital Record - Exhibit 3 - Continuation Record, dated November 11, 1971).

Plaintiff Perez was discharged from the hospital five days later and the Discharge Summary listed as the "pertinent data leading

to admission", the fact that:

> Evidently, she is very obsessed with the fact that she had a child whom she has given out for adoption. There was some vague suicidal idealism accompanying this. (Exhibit 3, Bellevue Hospital Record, Discharge Summary, John Graham, M. D., dated November 16, 1971).

Subsequent to these events, St. Joseph's and Foundling Hospital discussed with BCW the fact that Plaintiff Perez had not signed a written consent authorizing the placement of Danny and Marisol.[72] Ultimately, it was decided by St. Joseph's, which had major case work responsibility for the children, that no attempt would be made to have Plaintiff Perez sign a consent because it was clear that Plaintiff Perez was opposed to the placement of the children and it would, therefore, be impossible to get her to sign a consent.[73] Defendants then waited to see what legal action, if any, Plaintiff Perez would take.[74]

On February 22, 1972, Plaintiff Perez commenced a writ of habeas corpus in New York Supreme Court alleging that her children were being detained illegally. Approximately ten days later a neglect proceeding was filed in New York Family Court alleging that Plaintiff Perez had neglected Danny and Marisol who for the past twenty-six months had been detained by Defendants without the consent of Plaintiff Perez.[75] The writ of habeas corpus was transferred to New York Family Court for a consolidated trial with the neglect proceeding. St. Joseph's and Foundling Hospital and BCW were parties to the Family Court proceeding.

At the trial of the within action, Plaintiffs' motion to introduce evidence regarding the proceedings in New York State Court was denied by the District Court. Plaintiffs made an offer of proof at trial showing that the New York Supreme Court, Appellate Division, reversed the finding of neglect made by the Family Court against Plaintiff Perez and that the Appellate Division noted that the custody of the children was unlawful:

> On this appeal, petitioner urges that the removal and detention of her children . . . was violative of the Family Court Act and the Social Services Law . . . . [P]etitioner's contention is correct since initially there was no court order obtained and neither did she give her written consent to the removal and detention of her children, nor was a petition timely made to the court as required. Matter of Daniel C., 47 A.D.2d 160 at 163 (A at p. 56).

The Appellate Division further held that:

> There was no evidence of maltreatment of the children by petitioner or that in the past they suffered harm at her hands. Whenever she felt a possible recurrence of her disability, petitioner would voluntarily sign herself into a hospital facility for treatment, apparently after first arranging for the care of the children . . . . Even during the period that petitioner was refused custody, there was some demonstration by her of parental concern and affection for the children. The fact that she had been confined to hospitals at intervals did not establish neglect or unfitness per se . . . . Matter of Daniel C., 47 A.D.2d 160 at 164-165. (A at p. 56)

ARGUMENT

POINT I

PLAINTIFFS' RIGHT TO LIVE TOGETHER AS A FAMILY IS A FUNDAMENTAL AND ESSENTIAL RIGHT WHICH IS PROTECTED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. The Right to Maintain a Family Has Been Recognized As a Fundamental Right Protected by the Constitution.

The Fourteenth Amendment prohibits the State from depriving any person of property without due process of the law. Plaintiffs contend in this action that they are guaranteed by the United States Constitution the right to raise a family and to live together as a family unit. Plaintiffs further contend that Defendants acting under color of state law, deprived Plaintiffs of their right to maintain the integrity of their family unit and that Defendants denied Plaintiffs their right to due process.

In Stanley v. Illinois, 405 U.S. 645 (1972), the Court recognized that as a matter of due process, a parent cannot be deprived of custody of his child without the opportunity for a hearing. The Court in Stanley noted that the right to maintain the family unit was not a new concept and that it had been recognized repeatedly in past decisions:

> The Court has frequently emphasized the importance of a family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L. Ed. 1042 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316

> U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L. Ed. 1655 (1942) and "[r]ights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L. Ed. 1221 (1953), "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L. Ed. 645 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, 316 U.S. at 541, 62 S.Ct. at 1113 and the Nine Amendment Griswald v. Connecticut, 381 U.S. 479, 496, 85 S.Ct. 1678, 14 L. Ed.2d 5110 (1965) (Goldberg J. concurring). Stanley, supra, at 651-652.

It is clear from the cases cited above that the right to maintain the family unit and the parent's right to custody of children has long been held to be a constitutional right protected by due process.

New York courts have also recognized the fundamental right of a parent to establish a home and bring up children. See, People ex rel Portnoy v. Strasser, 303 N.Y. 539, 542. In People ex rel Kropp v. Shepsky, 305 N.Y. 465, the Court held that a parent's right to custody of the child could not be interferred with unless the non-parent met the burden of proof by establishing that the parent is unfit to have custody of the child, and that the child's well-being requires separation from its parent.

There can be no question, therefore, that Plaintiff Perez had a constitutional right to custody of her children, and Plaintiffs Cruz and Lopez, had a concommitant right to live undis-

turbed in their family unit. Plaintiffs can only be deprived of these rights by procedures which comply with due process standards.

B. Due Process Requires That Plaintiffs Be Afforded a Hearing Before They Were Deprived of Their Constitutional Right to Live Together As a Family.

The facts in the case at bar show that Defendants took custody of infant Plaintiffs on December 17, 1969 and continued this custody until March 7, 1972 without Plaintiff Perez's consent and without Court authorization. Throughout this period, Plaintiff Perez requested the return of Danny and Marisol but these requests were denied. Plaintiffs contend that they were denied due process where Defendants retained custody of the children for over two years without parental consent or court authorization.

In Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123 (19__), the Court emphasized that it is a basic right of our society to be heard before being required to suffer a grievous loss. It is clear that the loss of the custody and care of children is so grievous as to warrant a hearing before a family is separated. In Armstrong v. Manzo, 380 U.S. 545 (1965), an adoption proceeding was held to be violative of due process because a father was not given prior notice and an opportunity to be heard. The Court held:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty, or

> property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank and Co., 339 U.S. 306 at 316 (Armstrong v. Manzo, supra, at 550.)

In addition to recognizing the parent's right to a hearing before adoption can terminate parental rights, the Court specified:

> A fundamental requirement of due process is "the opportunity to be heard" Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." (Armstrong, supra at 552) (Emphasis added.)

In Stanley v. Illinois, supra at 649, the Supreme Court held that due process is violated if a parent is denied custody of children without a hearing, and the opportunity to defend. This was not a new right which was being declared. The Stanley decision rests on traditional concepts of due process which had been recognized in past cases. In Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), garnishment procedures were held to violate due process because notice and an opportunity to be heard were not given before the in rem seizure of wages. In Sniadach, the court recognized that a pre-judgment garnishment could impose tremendous hardships and concluded:

> Where the taking of one's property is so obvious, it needs not extended argument to conclude that absent notice and a prior hearing (c.f., Coe v. Armour Fertilizer, 237 U.S. 413, 423, 35 S.Ct. 625, 628, 59 L. Ed. 1027) this prejudgment garnishment procedure violates the fundamental principles of due process. Sniadach, supra at 342.

In a concurring opinion, Justice Harlan emphasized:

> I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this Court. Sniadach, supra at 343.

The Court held in Goldberg v. Kelly, 397 U.S. 254 (1970), that public assistance benefits could not be terminated without a prior hearing. In Goldberg, the reasoning of the District Court was adopted:

> . . . the stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal. 294 F.Supp. at 904-905. Goldberg, supra at 266.

The traditional concept of due process set forth in the cases cited above was reiterated in Fuentes v. Shevin, 407 U.S. 67 (1972):

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified." Baldwin v. Hale, 68 U.S. 223, 233, 17 L. Ed. 531, 534. See Windsor v. McVeigh, 93 U.S. 274, 23 L. Ed. 914; Hovey v. Elliott, 167 U.S. 409, 42 L. Ed. 215, 17 S.Ct. 841; Grannis v. Ordean, 234 U.S. 385, 58 L. Ed. 1363, 34 S.Ct. 779. It is equally fundamental that the right to notice and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner". Armstrong v. Manzo, 380 U.S. 545, 552, 14 L. Ed.2d 62, 66, 85 S.Ct. 1187. (Fuentes, supra at 79-80.)

> This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments . . . . The Court has traditionally insisted that whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. E.g., Bell v. Burson, 402 U.S. 535, 542, 29 L. Ed.2d 90, 96, 91 S.Ct. 1586; Wise v. Constantineau, 400 U.S. 433, 437, 27 L. Ed.2d 515, 519, 91 S.Ct. 507; Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed.2d 287, 90 S.Ct. 1111; Armstrong v. Manzo, 380 U.S. at 551, 14 L. Ed.2d at 66, Mullane v. Central Hanover, supra at 313, 94 L. Ed. at 872; Opp Cotton Mills v. Administrator 312 U.S. 126, 152-3, 85 L. Ed. 624, 639, 640, 61 S.Ct. 524; U.S. v. Illinois R R, 291 U.S. 457, 463, 78 L. Ed. 909, 917, 54 S.Ct. 471; Londoner v. City and Co. of Denver, 210 U.S. 373, 385-386, 52 L. Ed. 1103, 1112, 28 S.Ct. 708. See In Re Ruffalo, 390 U.S. 544, 550-551, 20 L. Ed.2d 117, 121, 122, 88 S.Ct. 1222. (Fuentes, supra at 83.)

C. Plaintiffs' Right to Live Together as a Family and Plaintiff Perez's Right to Custody of her Children Are Recognized and Protected by New York Statutory Law.

The New York statutes in effect at the time of infant Plaintiffs' removal from their mother, and the statutes which took effect after the removal demonstrate that Defendants' custody of Plaintiffs was unlawful as a matter of State law as well as a constitutional violation. Under New York statutes, Defendants were prohibited from taking custody of infant Plaintiffs, over Plaintiff Perez's objection, unless they obtained court authorization. In a prior appeal in this case, this Court recognized that the New York Social Services Law effective in 1969 required that Court authorization be obtained before Defendants take custody of children without parental consent:

> These children were placed in defendant institutiona in December of 1969. At that time, §398, subd. 2(b) of the New York Social Services Law, McKinney's Consol. Laws, c. 55 declared that the power and the duty of a social welfare officer was to "[r]eceive and care for any child alleged to be neglected or abandoned who is temporarily placed in his care by the family court pending adjudication by such court of the alleged neglect or abandonment. . . ." This provision seems to imply that there was no authority at that time to receive and care for appellant's children without an order, or at least a pending proceeding to obtain an order, of the family court. (Perez v. Sugarman, supra at 764, footnote 3.) (A at p. 50)

This Court then pointed out that while the children were in custody, the Social Services Law was amended to require that where removal is effected without Court authorization, there shall be prompt application to the court for authorization:

> On June 1, 1970, when the appellant's children were still in the custody of the institutions, amendments to §398 became effective. The law then read and now provides that "[a] social services official shall have the same authority as a peace officer to remove a child from his home without an order of the family court and without the consent of the parent . . . if . . . continuing in the home presents an imminent danger to the child's life or health. When a child is removed from his home pursuant to the provisions of this subdivision, the social services offical shall promptly inform the parent . . . and the family court of his action." (Emphasis supplied). NYSSL §398, subd. 9. Although this amended section might authorize removal from the home without a court order, it would not seem to justify a detention in excess of two years without a court order or a hearing. Moreover, as we have stated, the initial removal in this case would appear to have been governed by the provisions of §398 existing on the date of that removal.

> Thus, it is possible that both the initial removal and the subsequent detention involve violations of law. (Perez v. Sugarman, supra at 764, footnote 3.)

The New York Family Court Act is also relevant to the removal and detention of infant Plaintiffs. The provisions of the New York Family Court Act are similar to the requirements of the Social Services Law in requiring that children not be removed and detained from their homes without the opportunity for court review and court authorization. When infant Plaintiffs were removed in December, 1969, former Article 3 of the Family Court Act, now covered by Article 10 of the Family Court Act, was in effect. Section 311 specified that due process applied to neglect proceedings and to the procedures for removing children from parental custody. Sections 321 to 328 provide that children can be removed from parental custody on the grounds that the child is neglected, but there must be an immediate application to the Family Court for authorization to continue the custody of the child outside its home. Therefore, both the provisions of the Social Services Law and the provisions of the Family Court Act prohibited Defendants from assuming custody of infant Plaintiffs for over two years without court authorization.

It is clear from the facts of this case that Defendants retained custody of infant Plaintiffs as neglected children. Because Defendants treated infant Plaintiffs in the status of "neglected" children, the provisions of the Family Court Act are relevant to this case. Defendants Foundling Hospital and St.

Joseph's argued below, and the District Court held, that infant Plaintiffs were destitute children rather than neglected. Defendants obviously are trying to avoid their obligation to comply with the mandates of the Family Court Act when they argue that they viewed infant Plaintiffs as destitute rather than neglected children. The facts of the case at bar, however, make it abundantly clear that Defendants treated infant Plaintiffs as neglected. In March, 1972, after Defendants had been served with a writ of habeas corpus in which Plaintiff Perez sought return of her children, Defendants commenced a neglect proceeding against Plaintiff Perez in New York Family Court. By prosecuting this neglect proceeding, Defendants acknowledged that they afforded infant Plaintiffs the status and classification of "neglected" children. On appeal, the Appellate Division, First Department, held that Defendants' custody violated the Family Court Act:

> On this appeal, petitioner urges that the removal and detention of her children was without a court order or her written consent and therefore was violative of the Family Court Act and the Social Services Law. Since the children were removed from petitioner in 1969, former Article 3 of the Family Court Act, now covered by Article 10 of such Act, (See especially §1021 et seq.) as well as the relevant portions of §§383, 384 and 398 of the Social Services Law would apply, and petitioner's contention is correct since initially there was no court order obtained and neither did she give her written consent to the removal and detention of her children, nor was a petition timely made to the court as required. `(In Re Daniel C., 47 A.D.2d 160)

On the alleged neglect by Plaintiff Perez, the Appellate Division noted:

> A finding of neglect should not be made lightly, nor should it rest upon past deficiencies alone . . . . There was no evidence of maltreatment of the children by petitioner or that in the past they suffered harm at her hands. Whenever she felt a possible recurrence of her disability, petitioner would voluntarily sign herself into a hospital facility for treatment, apparently after first arranging for the care of the children. In Re Daniel C., 47 A.D.2d at 160. (Emphasis added.)

Plaintiff Perez consistently contended that she never neglected her children in any way. The decision of the Appellate Division is in accord with Plaintiff Perez's position. However, the facts show that Defendants were of the opinion that Plaintiff Perez was guilty of neglect, and Defendants' conduct demonstrates that they continued custody of the children on the basis of their conclusion that Plaintiff Perez had neglected the children. That Defendants considered this a case of neglect is obvious by the fact that after holding the children for over two years without any legal authorization, Defendants applied to the New York Family Court for a finding of neglect. Though Defendants did not prevail as a matter of law, they took the position in Family Court that Plaintiff Perez had neglected the infant Plaintiffs, and that, therefore, Defendants' custody of the children was justified. In this action, and for the obvious purpose of escaping liability, Defendants changed horses in mid-stream, and assert that they did not hold the children as neglected children, but

rather, as destitute. Since the children are destitute, Defendants argued that there is no failure by them to comply with the mandates of the Family Court Act.

Plaintiffs agree with the conclusion that Plaintiff Perez was not guilty of neglect. However, the facts show that for years Defendants maintained that infant Plaintiffs were neglected, therefore, Defendants must be held to have violated the Family Court Act because they failed to make a prompt and timely application to the Family Court for authorization to continue custody of infant Plaintiffs.

The complaint alleges a violation of state law. Throughout the complaint the wrong complained of is defined in terms of the requirements of state law - that is that defendants' detention of the children was unlawful because it was not based on legal authorization by parental consent or court order. The fourth and fifth claims for relief are specifically limited to non-constitutional state law violations. Plaintiffs respectfully assert in this appeal that the District Court erred in dismissing the allegations in the complaint which speak to defendants' violations of procedures mandated by New York statutes as set forth herein above.

POINT II

DEFENDANTS NEW YORK FOUNDLING HOSPITAL AND ST. JOSEPH'S HOME OF PEEKSKILL DENIED PLAINTIFFS THEIR CONSTITUTIONAL RIGHT TO LIVE TOGETHER AS A FAMILY AND VIOLATED PLAINTIFFS' RIGHT TO DUE PROCESS

A. Defendants Acted in Flagrant Disregard Of Plaintiffs Constitutional Rights.

New York Foundling Hospital and St. Joseph's Home of Peekskill are voluntary child care agencies which assumed custody of infant Plaintiffs on behalf of the New York City Commissioner of Social Services. In a prior appeal this court held that the action of these institutions with respect to care of children placed by the Commissioner constitutes state action. Perez v. Sugarman, 499 Fed. 761 (2nd Cir., 1974).

From the time that Defendants assumed custody they had both actual and constructive knowledge that there was no legal basis for their custody of the children (Statement p. 10 ¶4). No court order order or legal authorization in the form of parental consent was in Defendants' files which contained minutely detailed information regarding plaintiffs. Morever, St. Joseph's testified at trial that there were regular case conferences and regular review of the file in Plaintiffs' case (Statement p. 10, ¶2), and that although it was learned that there was no legal authorization for the custody, St. Joseph's took no action to legitimatize the custoday of the children (Statement p. 10, ¶5) or to afford Plaintiffs their due process rights.

These facts, and the documentary evidence introduced at trial paint a clear picture of what occurred in Plaintiffs' case: Defendants thought that Plaintiff Perez was incapable of caring for the children, and Defendants knew or should have known that they had no legal authority for their custody of the children, but regardless Defendants, assuming the function of both accusor and judge, reached and implemented the determination that Plaintiff Perez would not have custody of her children. This action by Defendants was outside the scope of their powers and jurisdiction and it was in flagrant disregard of Plaintifffs' constitutional right to live together as a family. Regardless of their lack of authority, and regardless of the objections of Plaintiff Perez, Defendants continued custody of the children.

The institutional records show that when custody of the children was assumed Defendant institutions concluded as a matter of their personal judgment that Plaintiff Perez was not able to function properly as a mother and that she, therefore, should not have custody of her children. When Plaintiff Perez was released from the hospital in February 1970 she went to New York Foundling to request the return of her children, and Plaintiff Perez expressed her hope and belief that she would remain well and would not have to be hospitalized. The Foundling Hospital record quotes Plaintiff Perez as saying, "I'm not gonna' go back to the hospital. I'm gonna' try . . . I'm gonna' do my best." (Exhibit 6, 2/27/70). At this early stage of the custody Foundling Hospital noted that Plaintiff Perez sounded "maudlin" and the hospital concluded, "If nothing else Miss Perez retains some unrealistic hope in the face of an

objectively bleak future. Even if others are led to believe her cause is lost, the mother is still groping." (Exhibit 6. Foundling Record, February 27, 1970). The record also shows that St. Joseph's had a similar opinion of Plaintiff Perez, and that St. Joseph's concluded that Plaintiff Perez was "sweet, but not mother material". (Exhibit 6, Foundling Hospital Record, April 2, 1970). The situation is, therefore, clear in Defendants' own words: Plaintiff Perez "supplicated" (Exhibit 6, Foundling Hospital Record, March 26, 1970) for the return of her children, but, regardless of the absence of court authorization, and regardless of the psychiatrists' recommendation, the institutions denied Plaintiff Perez custody of her children because in their opinion she was not "mother material". Defendants' conduct can only be viewed as flagrant disregard of Plaintiffs' constitutional right - the right to live together as a family unless a court determines after a hearing that the children, for good and demonstrated cause, should be removed from a parent's custody.

In April 1970 Plaintiff Perez's psychiatrist stated that she was well enough to function as a mother and recommended that the children be returned one at a time to Plaintiff Perez. (A at p. 49). Notwithstanding this psychiatric opinion and recommendation, Defendant institutions continued to deny Plaintiffs their constitutional right to live together as a family, and Plaintiff Perez's constitutional right to custody of her children. It is evident that Defendants chose to implement their own decision that Plaintiff Perez's cause was lost and that she was not "mother material." Defendants implemented their decision despite the opposing recom-

mendation by the psychiatrist and despite the fact that Plaintiff Perez had been told that the criteria for when the children would be returned would be the psychiatrist's recommendation. Defendants' refusal to return the children, under the circumstances of this case, can only be viewed as a flagrant disregard of Plaintiff's constitutional rights.

These institutional Defendants, in an attempt to justify their unlawful conduct, argued below that they could not have returned the children to Plaintiff Perez without the approval of BCW. This assertion does not justify Defendants' denial of Plaintiffs' constitutional right to live together as a family. Moreover, the facts show that Defendants were not only able to return the children to Plaintiff Perez, but that, indeed, St. Joseph's decided to return Danny to his mother in September, 1970. The detailed information in St Joseph's case record demonstrates that the decision to return Danny was made independently by the institution. There is no communication in any of the case records in which St. Joseph's either gives prior notice to BCW of its decision, or seeks the approval of BCW for the planned return of Danny. The plan to return Danny was cancelled at the last minute because he allegedly expressed fear about returning home. Nonetheless, in planning for the return of Danny, the institutions recognized and accepted their power, ability and responsibility to return the children to their mother.

Despite the absence of court authorization, despite Plaintiff Perez's request for return, and despite the psychiatric recommendation that the children be returned, Defendants St. Joseph's and

the Foundling Hospital refused to return the children. Defendants' custody of the children without legal authorization and over the protests of Plaintiff Perez was a flagrant violation of Plaintiff Perez's constitutional right to custody of her children and of Plaintiffs' constitutional right to live together as a family.

B. The District Court Erred As a Matter of Law in Dismissing the Constitutional Claims Against Defendants New York Foundling Hospital and St. Joseph's Home of Peekskill.

In a decision dated April 26, 1976 the District Court Dismissed Plaintiffs' allegations that Defendants New York Foundling Hospital and St. Joseph's Home had violated their constitutional rights by maintaining custody of infant Plaintiffs from December 17, 1969 until March 7, 1972 without court authorization, and without affording Plaintiffs the benefit of a hearing. The dismissal appears to be based on three conclusions: that the infant Plaintiffs were "destitute" children rather than "neglected"; that the initial custody of infant Plaintiffs was "clearly proper"; and that in accordance with Boone v. Wyman, 295 F. Supp. 1143 (S.D.N.Y., 1969), aff'd, 412 F.2d 857 (2nd Cir. 1969(, cert. denied, 396 U.S. 1024 (1970), there was no violation of due process. Plaintiffs respectfully assert that these three findings are erroneous as a matter of law. Each of these findings is discussed individually below.

(i) The Initial Custody was Not Proper Because Defendants Failed To Obtain Prompt Judicial Authorization

Plaintiffs assert that the District Court's holding that "the initial custody in December 1969 was clearly proper since the facts show an emergency situation with the mother in the psychiatric ward of Bellevue...." is erroneous as a matter of law. Plaintiffs,

in accordance with this court's comment in the earlier appeal Perez v. Sugarman, supra., at 764, Footnote 3, assert that Defendants were not permitted to assume custody of infant Plaintiffs without a court authorization and without affording Plaintiffs an opportunity to be heard. Even assuming arguendo that Defendants were authorized to take custody of infant Plaintiffs on December 17, 1969 because of Plaintiff Perez's hospitalization, Defendants were nonetheless required to apply promptly for court authorization to continue the custody. See Sections 324 - 326, New York Family Court Act which was in effect in December 1969. Under this statute where Defendants removed children without a court order Defendants were required to promptly inform the parent of the location of the children, and inform the Probation Service of the Family Court which would in turn investigate and either return the children or forthwith cause a proceeding to be commenced in Family Court. The Committee Comments in Section 321 of the Family Court Act point out that the requirement of commencing a proceeding in Family Court was "designed to avoid any abuse and to assure judicial review of ground for an extended removal". In other words, the provisions of the Family Court Act were designed to avoid the situation which Defendants subjected Plaintiffs to - a separation of the family for over two years without court authorization, or an opportunity for a hearing. Moreover, regardless of how the infant Plaintiffs are designated, in accordance with traditional concepts of due process, Defendants were prohibited by the United States Constitution from depriving Plaintiffs of their constitutional right to live together as a family without affording Plaintiffs the benefit of a hearing, and the opportunity to hear the evidence and present a defense. The

initial period of custody was not proper under constitutional or New York law because Defendants, acting on their own personal judgment and without legal authority, took the children without affording Plaintiffs an opportunity for a hearing. In so doing Defendants usurped a judicial function and power. Defendants' continued custody in this manner for over two years was obviously in violation of the constitution and the New York Social Services Law and the Family Court Act because during this period Defendants failed to make a prompt application for court authorization of the custody.

(ii) The Evidence Does Not Support The Designation of Infant Plaintiffs as "Destitute". Defendants Designated Them as Neglected.

The District Court stated that it was necessary to make a determination as to whether infant Plaintiffs were destitute, neglected or abandoned. The District Court held that infant Plaintiffs "should be designated as destitute [Social Services Law §371 (3)] since abandonment and neglect imply improper acts on the part of the parent."(A at p. 43). Plaintiffs agree that the record in this case prohibits any finding that Plaintiff Perez acted improperly. However, Plaintiffs assert that infant Plaintiffs should not be designated as "destitute" because they neither fit the definition of destitute children as defined in Social Services Law §371(3); nor did Defendants consider or treat them as destitute children. Therefore, if infant Plaintiffs are designated in hindsight as "destitute" it only serves to bolster Defendants' meritless argument that there was no constitutional requirement to obtain judicial authorization for their detention of infant Plaintiffs from December 1969 until March 1972.

Infant Plaintifs do not meet the definition of destitute children which is established in the Social Services Law. Section 371(3) states:

> "Destitute child" means a child who through no neglect on the part of its parent, guardian or custodian is
>
> (a) destitute or homeless; or
>
> (b) in state of want or suffering due to lack of sufficient food, clothing, or shelter, or medical or surgical care;

Examining infant Plaintiffs in the context of this legal definition it is clear that they are not destitute. Infant Plaintiffs were not homeless. Plaintiff Perez had made a good and adequate home for them in 1969 before she was hospitalized. The BCW Psycho-Social Summary (Exhibit 1) acknowledges that Plaintiff Perez was a good homemaker who managed money reasonably well, and Josephina Duchesne, and Hector Perez testified that in 1969 when the infant Plaintiffs were home Plaintiff Perez maintained a good home for the children. When plaintiff Perez was released from the hospital she obtained another apartment and established a home for herself and her children. Defendants visited this home and reported that it was adequate, clean and neat, and that Plaintiff Perez had room and furnishings for the infant Plaintiffs in the hope that they would be released to her (Exhibit 1, May 12, 1970). It is clear from this evidence that infant Plaintiffs were not homeless. Their mother was merely in the hospital for approximately six weeks, and during this period of hospitalization Josephina Duchesne, the maternal grandmother, requested that Danny be permitted to live in her home (Exhibit 5, January 13, 1970). Infant Plaintiffs were not in a state of want due to lack of sufficient food, clothing, shelter or medical

care. When Defendants took custody of the children they were in good health, and they had received health care and vacinations at neighborhood clinics (Exhibit 1, December 17, 1969; Exhibit 6, December 23, 1969). Moreover, Danny attended a neighborhood school, had a good attendance record and was a good student (Exhibit 1, December 17, 1969). There is no evidence whatsover that infant Plaintiffs lacked a home, food, clothing, shelter or medical care. Their mother was hospitalized for six weeks but they were not destitute as defined by the Social Services Law.

Furtnermore, the evidence shows that Defendants did not consider or treat the infant Plaintiffs as "destitute" during the years that they retained custody of the children without any legal basis. Defendants' conduct demonstrates that Defendants designated infant Plaintiffs as neglected children because as soon as Plaintiff Perez commenced a habeas corpus proceeding for the return of the children Defendants charged Plaintiff Perez with neglect of the children. Therefore, it is evident that Defendants considered the infant Plaintiffs to be neglected children. Accordingly, since Defendants viewed the children as neglected, they were required by former Article 3, now Article 10, of the Family Court Act to make a prompt application to the court for authorization to continue custody. Defendants' failure to comply with the Family Court Act cannot at this late point be excused by describing the children as destitute rather than neglected. Moreover, assuming arguendo that Defendants classified the infant Plaintiffs as destitute, Section 398, subd. 2(b) of the New York Social Services Law, effective in December 1969

when Defendants took custody, implies that custody could not be assumed without a court order, or at least a pending court proceeding to obtain court authorization to custody.

Palintiffs contend that since Defendants considered the infant Plaintiffs to be neglected, as was proven when Defendants prosecuted Plaintiff Perez for neglect, Plaintiffs are entitled to the benefit of the procedures set forth in the Family Court Act which required Defendants to seek court authorization for continued custody. However, even if infant Plaintiffs are designated as destitute, Defendants have nonetheless violated Plaintiff's constitutional rights because they failed to afford them the benefit of a hearing before Defendants terminated and denied them their constitutional right to live together as a family. This is an obvious example of the adage "a rose by any other name will smell as sweet". It does not matter how the children are designated, the constitutional violation remains. No person can take and retain custody of children from a parent because he deems it proper. A non-parent can only retain custody of a child with the authorization of a court, or the parent. Defendants retained custody of infant Plaintiffs without the required authorization. Defendants thereby violated the constitution and this violation will not disappear by re-designating the children in hindsight as "destitute".

(iii) Boone v. Wyman is Not a Proper Basis for the Dismissal of Plaintiff's Claim That They Were Denied Their Constitutional Right to Live Together as a Family Without Due Process.

The case of Boone v. Wyman, supra, is inapplicable and distinguishable from the case at bar, and does not form a basis for dismissing Plaintiffs' constitutional claims.

In Boone v. Wyman there were two Plaintiffs - Mr. Boone, the father of a child born out of wedlock, and Ms. Gonzalez the mother of the child. Both children had been placed with the Commissioner of Social Services by their mothers who had executed written, voluntary consents to placement. Approximately one and three years respectively after the mothers had executed the voluntary consent to placement Mr. Boone and Ms. Gonzalez requested the return of the children. New York Foundling Hospital, who had custody, refused to return the children. The Plaintiffs then brought an action alleging that Section 383 of the Social Services Law was unconstitutional. Section 383 provids/ that where a child is"remanded or committed" and that where the legal authority for placement was a written consent, a parent was not entitled to the return of a child without consent of the Commissioner. Plaintiffs in Boone v. Wyman also contended that when they requested return of the children, and termination of the voluntary placement and the request was denied a hearing should have been afforded them. The court held (Boone v. Wyman, 295 F. Supp. 1143, at 1149) that where custody is being sought the New York Supreme Court has sole jurisdiction to determine the custody of children in the state of New York. The court held that:

> The effect of granting the relief requested in the present case would be to embroil this court in a domestic tug of war between Boone and the mother as to whom should have custody of the child. Traditionally such disputes have been treated as falling within the exclusive jurisdiction of the state courts. (Boone, supra, at 1150).

Under the circumstances of the Boone case, where the mother had executed a written voluntary consent to placement, where the children had been legally "committed", where

the New York Foundling Hospital reported that it was working toward discharge of the child, and where the parent was seeking custody of the child the court held that the existence of a prompt state judicial remedy assured the Plaintiff of procedural due process. The gist of the decision was that the father Plaintiff in Boone was seeking custody of his child, and that a custody application should be brought in state court rather than federal court.

The situation in the case at bar is factually distinct from the Boone case. In the instant case Plaintiffs are not asking the court to determine the question of custody. The question of custody was litigated in the state court. Rather Plaintiffs are seeking a declaratory judgment that Defendants violated their constitutional rights by detaining the children for over two years without legal authorization, and Plaintiffs are seeking money damages for the injury which resulted from Defendants' unconstitutional conduct. In the case at bar, unlike the situation in the Boone case, the Defendant custodians had no legal authority for their custody of the children because the placement had not resulted from either a court order or written voluntary consent. Rather Defendants in the case at bar had retained custody of the children without either a written voluntary consent of Plaintiff Perez, or court authorization. In so assuming and continuing custody in this manner for over two years Defendants violated Plaintiffs' constitutional right to live together as a family, and violated Plaintiff Perez's constitutional right to custody of her children. Defendants also violated the requirements of the New York Social Services Law and the Family Court Act which mandated Defendants to

obtain court authorization to legitimatize their custody of infant Plaintiffs. The custody in the Boone case was lawful because custody had been given by voluntary written parental consent. Under such circumstances the court held that due process did not require the child care agency to grant a parent a hearing when the parent wanted to terminate placement. This is a far different situation than that in the case at bar where Defendants' custody is clearly unlawful and has been proven unlawful (In Re Daniel C, supra.) because it was forced upon the plaintiffs without any legal authorization.

The court in Boone did not hold that there was no due process violation where a child care agency assumes and continues custody of children in the absence of parental consent, and without court authorization. In fact the Boone court citing Armstrong v. Manzo, supra, acknowledged that a parent cannot be deprived of a child without due process of law. The holding in Boone is narrow and will not cover the case at bar. The holding in Boone is simply that the federal court will not determine an application for child custody and in a case where there is legal authorization for a placement, in the form of a written voluntary consent by the parent, the child care agency does not violate due process by continuing custody and denying a parent's request for return. In such an instance the Boone court held that the parent should commence a custody proceeding in state court. The basic premise in the Boone holding, of course, is that the agency has legal authorization of custody based on the parent's written consent. Therefore, the Boone case resolves the issue of how to determine whether a child care agency's

legal custody should be terminated; and according to Boone that custody quarrel should be determined in state court. In the case at bar the issue is not whether to terminate a legal placement, or a parent's custody application, but rather to determine whether Defendants' conduct violated Plaintiffs' constitutional rights by assuming and continuing custody of the infant Plaintiffs for over two years without legal authorization and whether Plaintiffs are entitled to damages. Since the issue in the Boone case is clearly different that the issue in the case at bar, the holding in Boone is not dispositive of the case at bar.

POINT III

DEFENDANTS SUGARMAN, BEINE AND FASS FAILED TO PERFORM THEIR AFFIRMATIVE DUTY TO ADEQUATELY SUPERVISE THE BUREAU OF CHILD WELFARE AND THEIR FAILURE TO SUPERVISE RESULTED IN PLAINTIFFS' SUFFERING THE DENIAL OF THEIR CONSTITUTIONAL RIGHT TO LIVE TOGETHER AS A FAMILY

A. Description of the Functions of Defendants Sugarman, Beine and Fass.

The three individual Defendants, Sugarman, Beine and Fass, were officials of the Bureau of Child Welfare which assumed custody of Plaintiff Perez's children from December 1969 until March, 1972 without legal authorization.

Defendant Sugarman was the Commissioner of Social Services and his duties and responsibilities were detailed in the Social Services Law. Defendant Sugarman was charged with: administering public assistance and care (McKinney's SSL §77(1)); appointing deputy commissioners, assistants, and employees and directing their work (SSL §77(4)); making a detailed annual report to the Mayor regarding recipients of public assistance and care (SSL §83(2)); verifying the schedules for the payment of care of children who are placed outside their homes (SSL §83(3)). With respect to the care and protection of children, Defendant Sugarman was mandated by statute: to apply to court promptly where he assumed custody of a child without parental consent (SSL §398(9)); to keep records of all children in his care including the reason

for any act performed with respect to these children (SSL §372); to investigate neglect situations and if necessary to bring the case to court (SSL §398(2)(a)); to investigate the child's family for the purpose of determining the supervision needed (SSL §398(6)(a)); to accept parental surrender of custody where advisable (SSL §398( )); to supervise children until they are discharged from placement (SSL 398(6)(h); and to remove such children from placement and to make such disposition of these children as is provided by law (SSL §400).

These statutory provisions demonstrate that Defendant Sugarman had general and comprehensive responsibilities with respect to the care and custody of children in placement such as infant Plaintiffs. However, the statute authorizes Defendant Sugarman to accept custody of children only where there is legal authorization for the custody in the form of a written consent by the parent or a court order (SSL §382). In In Re Daniel C., 47 A.D.2d 160 (1st Dept., 1975) and in People ex rel Johnson v. Michael, 39 Misc.2d 365 (Sup.Ct., N.Y. Co., 1963), it was held that custody is unlawful where there is no legal basis for it in the form of either a court order or a written volunatary consent by the parent. The Johnson court ruled that the child care official's belief that placement was in the best interest of the children did not justify custody in the absence of legal authorization.

Elizabeth Beine was the Director of the Bureau of Child

Welfare for the City of New York for thirteen years, including the period of infant Plaintiffs' placement. As Director, Defendant Beine was responsible for the overall supervision and operation of BCW (Statement, p. 4, ¶1). Defendant Beine testified at trial that the purpose of BCW was to provide child care services within the home and that placement outside the home should be used only as a last resort when the child could not be cared for by parents or other relatives in the community (Statement, p. 4, ¶3). Defendant Beine's duties included formulating BCW policy, and supervising and updating the "Inter-Agency Manual of Policies and Procedures: Bureau of Child Welfare and Voluntary Foster Care Agencies," and meeting regularly with Defendant Commissioner Sugarman (Statement, p. 4, ¶7; p. 5, ¶11).

Defendant Seymour Fass testified that he has been employed by BCW for 22 years and that in January of 1972, he became the Director of the Manhattan/Richmond office of the Bureau of Child Welfare, and that as Director, he was responsible for the overall operations of that office (Statement, p. 8, ¶1).

B. The Inter-Agency Manual of Policies and Procedures: Bureau of Child Welfare and Voluntary Foster Care Agencies

The Inter-Agency Manual of Policies and Procedures (hereinafter "Manual") was introduced into evidence (Exhibit 2). This Manual sets forth procedures used by BCW and child care agencies (Statement, p. 5, ¶11). A review of the Manual shows that it is

a comprehensive and detailed outline of procedures to be used with respect to the care and custody of children. The Manual specifies that placements are to occur in accordance with the procedures of the New York Social Services Law and Family Court Act (§1(b)(3) and §2(a)). The Manual addresses both general and particular aspects of child care procedures. It covers a broad range of responsibilities.

With respect to the general purpose and philosophy of child placement, the Manual emphasizes that a parent has the primary right to custody of a child; that parental right to custody can be denied only for compelling reasons (§39(e)(1); and that the optium time to return children is during the first months of placement (§20(b)). The Manual also specifies that payment for the cost of placement should only be authorized where children are retained pursuant to the Rules and Regulations of the State Board of Welfare (§13(c)).

Intake procedures are explained in the Manual (§1). It is specified that the intake study should include specific documents such as birth certificates and divorce papers (§4(b)(6)). The Manual also requires that specific records be kept where there is a court ordered placement (§9(a)(5)).

Emergency placements are referred to in the Manual. It is specified that emergency placements may occur without parental consent (§5(i)). With respect to foundling children, the Manual directs that follow-up procedures must be taken (§6(c)).

Day to day procedures and routine conduct are also covered in the Manual. For instance, consents must be obtained for a child's medical treatment (§27); where an unknown relative requests visitation rights, both BCW and the child care agency are to review and pass upon the request (§36(b)(2)); abortions are available to children in placement (Memo of Defendant Beine dated August 25, 1970); placement may be extended beyond a child's 18th birthday (Memo of Defendant Beine dated May 23, 1969); a child's picture may not be released without parental consent (§33(d)); and the BCW Director is to approve summer camps for children which appear to be questionable for any reason (§37(d)).

Tha Manual also speaks to circumstances where there may be court action regarding children in placement. The Manual explains that where there is a custody question regarding a child in placement, the child care agency and BCW have joint responsibility for initiating or defending a habeas corpus proceeding (§30(f)(2)). In a situation where a parent refuses to return a child after a visit, the Manual directs that BCW and the child care agency decide jointly whether a proceeding will be commenced in court, and the Manual specifies that the primary responsibility to determine whether court action will be taken is with the child care agency (§38(b)).

The provisions in the Manual which are referred to above demonstrate that the Manual is a comprehensive compilation of procedures and

policies. Nowhere in the Manual is there any reference to or mention of the follow-up steps that are required where a child is placed without any legal authorization. The Manual does refer to follow-up procedures to be taken when foundling children are taken into custody (§6(c)), but there is no reference whatsoever regarding the responsibility to obtain legal authorization for the continued custody of other children, such as infant Plaintiffs, who have been taken in the absence of legal authorization. The Manual fails to recognize the responsibility to obtain legal authorization for the continued custody of children over the parent's objection.

C. The Failure of Defendants Sugarman, Beine and Fass To Perform Their Affirmative Duty to Give Adequate Supervision Resulted in Plaintiffs Being Denied Their Constitutional Right to Live Together As a Family.

Defendants Sugarman, Beine and Fass argued below that they had no knowledge of Plaintiffs, that they had no involvement with Plaintiffs and that, therefore, these Defendants are not liable for the unlawful custody. Plaintiffs contend that Defendants' assertion will not prevail to defeat Plaintiffs' claims. Despite lack of personal knowledge, these Defendants failed to perform their duty to supervise and thereby deprived Plaintiffs of their constitutional rights.

Defendants Sugarman, Beine and Fass were responsible for the child welfare operations in New York City which took custody of infant Plaintiffs. These Defendants had the affirmative duty

to supervise child welfare operations, and to assure that placements occurred in accordance with constitutional requirements and the requirements of the New York Social Services Law and Family Court Act. Defendants' duty in this respect is referred to in the Manual (§1(b)(3) and 2(a)). Defendants accepted a most serious public responsibility when they assumed the duty of providing child welfare services. This high public responsibility required that defendants carry out their duties with the highest standard of care. The standard of care imposed upon Defendants requires at the minimum that they adequately instruct and supervise so that children will not be held in placement over parental objection without obtaining legal authorization for the continued placement. It is apparent from the evidence of this case that Defendants failed to adequately supervise because they failed to publish and promulgate written regulations and guidelines about the required procedures in cases such as the one at bar where children are taken into placement without parental consent and without court authorization (Statement, p. 2, ¶7; p. 8, ¶6). After reviewing the detailed procedures set forth in Defendants' Manual, there is a glaring unanswered question - why didn't it occur to Defendants that their Manual should include instructions and procedures regarding the necessity and the manner of obtaining legal authorization for children who come into custody without such authorization? Why didn't Defendants foresee that if they

failed to issue such procedures and guidelines, children, like Plaintiffs, would inevitably suffer illegal placements? Where Defendants though to include in their Manual procedures regarding the need to obtain parental consent to release pictures, and the need to have the BCW Director approve "questionable" summer camps, why did Defendants fail to include procedures for obtaining authorization for questionable custody situations which commenced without legal authorization? These questions can only be answered by an acknowledgement that Defendants failed to recognize and accept their responsibility to supervise in this regard and thereby denied Plaintiffs their constitutional rights.

(i) Defendants Should Have Foreseen the Need for Written Guidelines and Procedures.

The Forward to the Manual (Exhibit 2) reveals that "The policies and procedures of the Bureau have as their goals the best interest of children, the protection of parental rights and obligations, and the welfare of the community." It is evident that these goals involve a delicate balancing and interrelation of fundamental parental, child and community rights. To carry out a task which involves so many potentially conflicting rights, it is clear that written procedures and criteria are necessary. There must be some basic procedures which will strive to protect the rights of all involved. It appears that the Manual was intended to fill that function. However, the

Manual is deficient to the extent that it fails to instruct on the necessity of obtaining legal authorization where children are in custody without any legal basis.

It is clear from the evidence in this case that children are taken into placement in emergency situations without obtaining parental consent. The Manual acknowledges that children are taken into custody in emergency situations without parental consent (§5(i)(1)). Defendants Beine and Fass testified that children are taken into custody without obtaining court authorization or parental consent (Statement, p. 5, ¶14, p. 6, ¶17, p. 8, ¶2). Defendant Princeler, who supervised the infant Plaintiffs' case, also testified that children come into custody without court order or parental consent (Statement, p. 1., ¶6). It is clear, therefore, that BCW and child care agencies accept custody of children on occasion without obtaining court authorization or parental consent. As a matter of both constitutional and state law, custody of a child cannot continue in the absence of court authorization unless there is parental consent. Therefore, Defendants have the duty to promulgate for inclusion in the Manual written guidelines which will instruct their staff on follow-up steps to be taken to legitimatize custody where parental consent has not been given. It was the responsibility of Defendants Sugarman, Beine and Fass to notify the staff of BCW and the child care agencies that custody cannot be continued in the absence of legal authorization in the form of a court

order or written parental consent.

The need for written procedures explaining the necessity of obtaining legal authorization for custody is evident in view of the testimony of Defendants Beine, Fass and Foundling Hospital. Each of these Defendants testified that custody of a child could be assumed in an emergency without parental consent and without court authorizations, and that such custody could continue indefinitely so long as BCW and/or the child care agency thought that continued custody was in the best interests of the child (Statement p. 6, ¶15; p. 8, ¶¶3-4; p. 13, ¶¶3-4). This testimony shows that Defendants were unaware of their legal obligation to obtain judicial authorization for custody where there was no parental consent. This testimony also shows that Defendants had no knowledge or appreciation that constitutional due process prohibits them from continuing custody of a child without legal authorization. Defendants Fass and Princeler also testified that there were no written guidelines instructing staff about required follow-up procedures where custody was assumed without legal authorization (Statement, p.2 , ¶7; p.8 , ¶ 6). Defendant Beine testified that the Manual did not contain any provisions regarding follow-up procedures where a child was taken into custody without legal authorization.

In the context of the evidence of this case - where there are no written procedures or guidelines setting forth procedures to be followed where custody is assumed without court authori-

zation or parental consent, and where the Defendants have testified as to their erroneous assumption that they have the right to continue custody indefinitely, regardless of the absence of parental consent or court authorization - it is no surprise that Plaintiffs were denied their constitutional right to live together as a family. Not only does the evidence demonstrate that Defendants Sugarman, Beine and Fass failed to adequately supervise because they did not issue written procedures and guidelines explaining that follow-up steps are required where there is no court authorization or parental consent, but also the evidence shows that Defendants Beine and Fass were themselves unaware of the need for such follow-up procedures because they testified that BCW had the right to maintain custody in the absence of legal authorization if BCW felt it was in the best interest of the child (Statement, p. 6, ¶15; p. 8, ¶¶3-4). This idea is clearly wrong as a matter of law. However, it is obvious that this mistaken view was transmitted to the staff of BCW and the child care agencies because Foundling Hospital testified that it also had the authority to continue custody in the absence of legal authorization so long as it deemed that placement was in the best interests of the child (Statement, p. 13, ¶¶3-4). Of course, the fact that Defendants held infant Plaintiffs for over two years without legal authorization is proof that Defendants implemented their legally erroneous view that they had the right to retain children in

the absence of court order or parental consent so long as Defendants deemed the custody necessary.

(ii) Plaintiffs Were Not the First Children To Be Illegally Detained by Defendants.

Defendants' retention of infant Plaintiffs without legal authorization was not the first time that Defendants retained custody of children in this unlawful manner. Moreover, in view of Defendants' Beine, Fass and Foundling Hospital, testimony that they are empowered to maintain custody of children despite the absence of legal authorization, and in view of the fact that there are still no procedures set forth in the Manual explaining that follow-up steps are necessary where custody is commenced without legal authorization, there is every reason to assume that in the future children will continue to be retained unlawfully.

In 1963, six years before infant Plaintiffs were taken into custody, the Commissioner of Social Services in New York City took custody of the Johnson child without court authorization or parental consent. The facts of People ex rel Johnson v. Michael, 39 Misc.2d 365 (Sup.Ct., N.Y. Co., 1963) are similar to the facts in the case at hand. In Johnson, the New York City police took custody of a child whose father was apprehended for public intoxication. The Commissioner of Social Services accepted custody of the child from the police and then placed

the child in a child care agency. The Commissioner retained custody of the child in the same manner that Defendants retained custody of infant Plaintiffs - that is, without any legal authorization. The parent of the Johnson child, like Plaintiff Perez, brought a habeas corpus proceeding in State court to regain custody of the child. As a defense to the habeas corpus, the Commissioner argued, as did Defendants in the case at bar, that the parent was unfit and, therefore, not entitled to custody. The Johnson court (supra at 366) held that there was no legal basis for the Commissioner's retention of custody because the child had not been judicially remanded or committed to the Commissioner pursuant to SSL §383 nor had the Commissioner made a diligent application to the Family Court for continued custody pursuant to Family Court Act §§324, 325. The import of the Johnson decision is that if the child welfare officials concluded that the parent was unfit and, therefore, incapable of performing parental responsibilities, than it was required that the child welfare officials make a prompt application to the Family Court in the context of a neglect proceeding. The court held that the parent is entitled to custody where child welfare officials have no legal basis to retain custody and the court cautioned:

> After a great many years of study and research, the Legislature has provided a specific forum for the problems of the "neglected child" and resort must be had to that court before the department can assert custodial rights superior to that of the natural parents. (Johnson, supra at 366).

Defendant Beine testified at trial that she had been Director of BCW for thirteen years. It appears that she was Director of BCW at the time of the Johnson decision which warned that prompt legal authorization must be obtained to continue custody of children. Defendant Fass testified at trial that he had been an employee of BCW for 22 years and that he became the Director of the Manhattan/Richmond BCW office in January, 1972. Defendant Princeler testified at trial that he was a supervisor at BCW and that he had been employed at BCW for the past 10 years. Each of these Defendants functioned as officials of BCW after the Johnson court had warned and directed that legal authorization must be the basis for the custody of a child.

Defendant Princeler testified at trial that there were occasions like that of infant Plaintiffs where custody of children was commenced and continued without legal authorization. Defendants Beine, Fass and Foundling Hospital testified, sixteen years after the warning in Johnson, that child placements can continue without legal authorization so long as Defendants think the placement is necessary. This evidence is a strong foundation for the conclusion that Plaintiffs were not the first children, nor will they be the last, to be continued in placement without legal authorization. Moreover, the fact that placements occurred without legal authorization is not surprising because there are no guidelines in the Manual explaining that follow-up steps are

required where a child is taken into custody without legal authorization. The serious consequences of Defendants' failure to perform their affirmative duty to adequately supervise is underlined by the fact that infant Plaintiffs are not the first children to suffer such an unlawful period of detention.

(iii) Case Law Supports Plaintiffs' Position That the Failure to Supervise Is a Basis for Defendants' Liability.

Defendants Sugarman, Beine and Fass were ultimately responsible for the operations of BCW, and they were required to adequately supervise the work of BCW and the child care agencies. Because in the manner set forth above these Defendants failed to adequately supervise, they are liable for the constitutional deprivation suffered by Plaintiffs. This Court recognizes that the failure to supervise can result in the deprivation of a constitutional right. Wright v. McMann, 460 F.2d 126 (2d Cir. 1972), cert. denied, 409 U.S. 885 (1972), which upheld a §1983 damage award against a warden upon allegations that conditions of solitary confinement violated constitutional rights. One of the reasons given by this Court for finding the warden liable was that the New York Correction Law specified that the warden was responsible for the general direction and supervision of the prison. Because the statute charged the warden with the duty to supervise, the Court in McMann held that the warden had the ultimate responsibility

made him liable for damages caused by the operations of the strip cells which resulted in denying plaintiffs their constitutional rights. The Court permitted recovery against the warden holding:

> . . . recovery should not be defeated by an attempt by the warden to shift responsibility to inferiors when there is every reason to believe that he was aware of segregation cell conditions and, when responsibility for permitting such conditions to exist was ultimately, in any event, squarely his. McMann, supra, 460 F.2d at 134-135. (Emphasis added).

The rationale of McMann applies to the case at bar where Defendants Sugarman, Beine and Fass had ultimate responsibility for the child welfare operations and where they had the duty to adequately supervise. Defendants' failure to adequately supervise is the basis for liability.

The McMann case also supports Plaintiffs' allegations that Defendants violated their constitutional rights by failing to adopt written procedures which would provide instructions regarding how lawful emergency removals should occur and under what circumstances they could continue. As a result of Defendants' failure, child welfare operations were conducted in a manner reasonably calculated to lead to illegal placements, which in itself constitutes a basis for liability. This conclusion was made abundantly clear by the Court in Wright v. McMann, supra, where the Court found that the warden's failure to set up written rules and procedures to protect his prisoner's right made him liable:

> As against these directives that the warden exercise responsibility for and be familiar with the treatment of inmates, however, Judge Foley found that "there was a design . . . to avoid written rule-making in the Clinton segregation unit: and that McMann made only "rare" visits to the segregation cells, 321 F.Supp. at 143. In short, applying the common law tort standard applicable in §1983 cases, that one is liable for the "natural consequences of his actions," Monroe v. Pape, 365 U.S. 167 . (1967), we think appellant McMann knew should have known that Wright was being forced to live under conditions described previously by this court as "foul" and "inhumane" 387 F.2d at 526, and today held unconstitutional. Wright, supra, 460 F.2d at 135.

In the case at bar, Plaintiffs contend that Defendants Sugarman, Beine and Fass knew or should have known that children were being detained without legal authorization because these Defendants failed to issue written guidelines and procedures regarding the follow-up steps required where children were taken without legal authorization. The natural consequence of Defendants' failure to issue such guidelines is that infant Plaintiffs and other children will be in custody without authorization and in violation of their constitutional rights.

A similar result was reached in United States ex rel Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975). In Larkins, a prisoner sought §1983 money damages from a prison warden and the Corrections Commissioner after he had been punished for possession of political writings. This Court held that it was unconstitutional for Larkins to have been punished by being held in segregation for twelve days. The Commissioner of Correction was held liable

for damages although he personally had not imposed the punishment. This Court held that the Commissioner could not avoid responsibility because the New York Correction Law mandated that the Commissioner be sent reports by the prison regarding all inmates held in segregations. On the basis of receiving such reports, the Court held that the Commissioner "therefore, is chargeable with knowledge of appellee's confinement." Larkins, supra, 510 F.2d at 589.

Under the Larkins theory, it is clear that Defendant Sugarman is liable for Plaintiffs' constitutional deprivation. The Social Welfare Law §372 and §398, requires Defendant Sugarman to keep records of children in his care and to investigate, and, if necessary, to initiate Family Court proceedings. Defendant Sugarman is also required to make verification for payments for children in placement (§83(j). As in Larkins, this statutory provision is a basis for holding that Defendant Sugarman knew or reasonably should have known that Plaintiff Perez's children had been removed without a court order and without consent and that they were being detained without any legal authorization.

The Fifth Circuit has adopted a similar standard of personal liability with respect to statutory obligations. In Whirl v. Kern, 407 F.2d 278 (5th Cir. 1969), the plaintiff was detained in jail for nine months after all charges were dismissed against him. The defendant sheriff was charged by statute with the duty of supervising the jail where plaintiff was held. The defendant

sheriff tried to avoid responsibility for plaintiff's unlawful detention on the grounds that he did not even know plaintiff was detained in the jail, nor was it by his personal acts that plaintiff was being detained. The Court of Appeals ruled that the defendant sheriff was liable for the detention because he was charged by statute with supervising the jail. The Court also found that plaintiff was not being held pursuant to a justifiable reliance on a warrant which was valid on its face, for there was, of course, no warrant authorizing detention. It was found that the sheriff relied on nothing, that his actions were not informed actions, and that he had the duty to supervise and to investigate, and ascertain the authority by which a prisoner is being detained. Attributing to the defendant sheriff the duty to know of the unlawful act, the Court held that the sheriff's statutory:

> . . . obligation cannot be avoided by delegating authority over the jail to deputies or other subordinates.
>
> * * *
>
> We do not think it is possible for the sheriff to discharge his supervisory duties and also to remain ignorant for a protracted period of a prisoner's very presence in his jail. Whirl v. Kern, supra, at p. 755.

As in Whirl, Defendants in the case at bar did not rely on a paper authorization which was valid on its face, but rather knowing that Plaintiff Perez had not signed a consent and faced with her continual demands for return, they still persisted in maintaining their unlawful custody over a period exceeding two years.

The foregoing arguments equally impose liability on each of the other Defendants. Defendants Beine and Fass accepted delegation of responsibilities with respect to administration and operation of child welfare from Defendant Sugarman, and by the same token, assumed the responsibility to discharge those duties in a legal manner. Defendants St. Joseph's Home and New York Foundling likewise accepted delegation of responsibilities by taking custody of the children and undertaking long-term planning and investigation responsibilities. Furthermore, the institutional Defendants actively pursued plans for extended placement over the vigorous and continued objection of Plaintiff Perez.

The evidence and law set forth above show that Defendants Sugarman, Fass and Beine failed to perform their affirmative duty to supervise because they failed to adequately instruct on the procedures required to legitimatize custody. The result of Defendants' failure to supervise was that the staff of BCW and the child care agencies were not informed of the required follow-up steps to be taken where custody was assumed without the legal authorization in the form of either a court order or parental consent. Because of Defendants' failure to supervise, Plaintiffs were denied their right to live together as a family despite the fact that Defendants had no legal basis for custody of infant Plaintiffs. Defendants' failure to supervise constituted a denial of Plaintiffs' constitutional rights. Moreover, Defendants Beine

and Fass demonstrated flagrant disregard for Plaintiffs' constitutional rights when they asserted their mistaken belief that they could continue custody of Plaintiffs and other children so long as Defendants deemed it in the best interests of the child regardless of the lack of legal authorization for such custody. This erroneous notion of their authority was obviously implemented when Defendants held infant Plaintiffs for over two years without court authorization or parental consent.

D. Defendants Sugarman, Beine and Fass Are Not Immune From Liability.

Defendants asserted below that they are immune from liability because they are public officials. Plaintiffs argue that Defendants do not have immunity which insulates them from liability for their actions which resulted in Plaintiffs suffering a loss of their constitutional rights to live together as a family. In making a decision with respect to the defense of immunity, the case of Wood v. Strickland, 420 U.S. 308 (1975) is relevant.

In Wood, the plaintiffs were 16 year old girls who had been expelled from school by the defendant members of the school board. The reason for the expulsion was that the plaintiffs admitted to "spiking" a punch at a school party. Plaintiffs brought a §1983 action seeking declaratory and injunctive relief and damages. The defendant members of the school board argued that they had absolute immunity because they were public officials. The Supreme Court held that there is no absolute immunity of public officials.

The Court explained (supra at 320) that absolute immunity is not justified because to deprive the students of a remedy where they have been "subjected to an intentional or otherwise inexcusable deprivation" would not result in increasing the school officials' ability to exercise their discretion. The Wood court held:

> Public officials . . . who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. (Wood, supra, at 321).

The Court concluded that where an official violates a student's constitutional right, that act "can be no more justified by ignorance and disregard of settled indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice." (Wood, supra, at 321). In explaining the standard of liability, the Court held that:

> . . . a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard neither imposes an unfair burden upon a person assuming reasonable public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of Section 1983. Wood, supra, at 322).

The Court concluded in Wood (supra at 322) that a school board member is not immune from damages in a §1983 action:

> . . . if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the studen affected . . . .

The rationale and standard set forth in the Wood case is applicable to the case at bar. Defendants Sugarman, Beine and Fass, like defendants in Wood, are public officials who voluntarily undertook the task of supervising the child welfare operations of BCW. In assuming their official roles, Defendants took on the responsibility to make decisions when needed and to implement decisions which have been made. It is a basic and unquestionable constitutional right that families are entitled to live together, and that parents are entitled to the custody of their children. This constitutional right can only be denied with due process of law. Defendants, as public child welfare officials, were required to know of this constitutional right and to conduct their official duties in such a way as to insure that neither their conduct, nor the conduct of BCW deprived Plaintiffs of their constitutional rights. The evidence shows that Defendants were ignorant of Plaintiffs' constitutional right to live together as a family because Defendants Beine, Fass and Foundling Hospital testified at trial that they could maintain custody of a child despite the absence of legal authorization so long as they deemed the continued custody was in the best interests of the child, and so long as they deemed an emergency existed which prevented the parent from functioning as a proper custodian of the

child. The evidence further shows that Defendants Beine, Sugarman, and Fass, in apparent ignorance of Plaintiffs' constitutional rights, failed to issue written regulations and guidelines in the BCW Manual of Procedures setting forth the fact that and the procedures for taking follow-up steps to seek and obtain legal authorization for custody in situations where custody commenced without such authorization. In accordance with Wood, it is clear that Defendants failed to conduct their duties with the required standard of care and that they, therefore, are not immune from liability for the injuries suffered by Plaintiffs' which were the natural consequence of Defendants' failure to properly carry out their duties.

If public school officials are held so accountable because of their effect on students' daily lives, defendants, as officials entrusted with the full-time care of others, especially children, must also be at least equally accountable for their actions. In another decision on §1983 immunity, the Court has confirmed this standard by indicating that the Wood v. Strickland standard also applied to the officials of a state mental hospital. O'Connor v. Donaldson, ____ U.S. ____, 45 L. Ed.2d 396 at 408 (1975).[1]

The Second Circuit also recognized such a high degree of

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1 The Court in fact indicated that the standard enunciated in Wood applies to all state officials.

accountability nearly ten years ago when it held that the officers and the supervising psychiatrist of a state mental institution can be held liable in a §1983 action. Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966). In Jobson, plaintiff, an inmate of a state mental hospital, alleged that defendants had subjected him to a work program which constituted involuntary servitude. Although the district court dismissed on the ground that defendants, as state officials, were immune from any §1983 liability, the Second Circuit reversed holding that these defendants were not entitled to such immunity. The Court stated that the defense of official immunity "should be applied sparingly in suits brought under §1983", 355 F.2d at 133, since, for example, to grant all state officers immunity would clearly frustrate the purpose of that section:

> [t]he purpose of §1983 as well as the other Civil Rights provisions is to provide a federal remedy for the deprivation of federally guaranteed rights in order to enforce more perfectly Federal limitations on unconstitutional state action. To hold all state officers immune from suit would very largely frustrate the salutary purpose of this provision. We conclude the defense of official immunity should be applied sparingly in suits brought under §1983. 355 F.2d at 133-134.*

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* For a more recent affirmation of the Jobson rationale, see, e.g., Sostre v. McGinnes, 442 F.2d 178, 205 n. 51 (2d Cir. 1971), cert. denied sub nomine Oswald v. Sostre, 405 U.S. 978 (1972) (state administrative officers are not immune from §1983 damage liability for confining prisoner because of his political beliefs and legal activities).

Furthermore, the doctrine of immunity applies only to discretionary duties. Defendants' conduct with respect to Plaintiffs does not fall into the area of discretion. Defendants were mandated by law to take custody of children only where there was a legal basis. Defendants had no discretion in this regard - they were obligated to carry out placements in a lawful manner. That is, Defendants were required to have a legal basis for their retention of children.

CONCLUSION

For the reasons set forth within it is respectfully requested that the dismissal by the District Court be reversed, and that this court hold that the complaint set forth a cause of action under New York statutes and the United States Constitution and 42 U.S.C. section 1983, and that the evidence demonstrates that plaintiffs were denied their constitutional rights by defendants in violation of due process, and for such other, further, and different relief as to the court may seem just.

Respectfully submitted,

Lisa H. Blitman

LISA H. BLITMAN, ESQ.
24 West 87th Street
New York, New York

Attorney for Plaintiffs-Appellants

Dated: New York, New York
February 7, 1977

FOOTNOTES TO STATEMENT OF FACTS

1. Exhibit 1, BCW Psycho-Social Summary, dated February 2, 1970, p. 2

2. Statement, p. 19, ¶4
   Statement, p. 14, ¶7

3. Exhibit 1, BCW case record, December 17, 1969

4. Statement, p. 14, ¶6

5. Exhibit 1, BCW case record, December 17, 1969
   Exhibit 6, Foundling Hospital Record, December 23, 1969

6. Statement, p. 24

7. Statement, p. 27

8. Exhibit 3, Bellevue Record

9. Exhibit 1, BCW Record, December 16, 1969

10. Exhibit 1, BCW Record, December 12, 1969

11. Exhibit 1, BCW Record, December 17, 1969

12. Exhibit 1, BCW Record, December 17, 1969

13. Exhibit 1, BCW Record, December 17, 1969

14. Exhibit 1, BCW Record, December 22, 1969

15. Exhibit 1, BCW Record. December 22, 1969

16. Exhibit 1, BCW Record, December 22, 1969

17 Exhibit 1, BCW Psyco-Social Summary, dated February 2, 1970

18. Exhibit 1, BCW Record, December 22, 1969

19. Exhibit 6, Foundling Hospital Record, December 23, 1969

20. Exhibit 6, Foundling Hospital Record, December 23, 1969

21. Exhibit 1, BCW Record, December 31, 1969
    Exhibit 3, Bellevue Hospital Record

FOOTNOTES TO STATEMENT OF FACTS - Con'd.

22. Exhibit 6, Foundling Hospital Record, February 27, 1970

23. Exhibit 5, St. Joseph's Record, February 13, 1970

24. Exhibit 5, St. Joseph's Record, January 13, 1970
Statement, p. 14, ¶10

25. Statement, p. 15, ¶11
Exhibit 5, St. Joseph's Record, January 13, 1970

26. Exhibit 4

27. Exhibit 4

28. Exhibit 6
Exhibit 5, St. Joseph's Record, Summary of Family Contacts, 2/70 - 3/70

29. Exhibit 6, Foundling Hospital Record, February 27, 1970

30. Exhibit 6, Foundling Hospital Record, February 27, 1970

31. Exhibit 6, Foundling Hospital Record, April 2, 1970

32. Exhibit 1, BCW Record, letter from Lower Manhattan Aftercare, dated April 29, 1970
Exhibit 5, St. Joseph's Record, has copy of same letter
Exhibit 1, BCW Record, May 11, 1970
Exhibit 5, St. Joseph's Record, May 15, 1970

33. Exhibit 1, BCW Record, May 11, 1970

34. Exhibit 1, BCW Record, May 11, 1970

35. Exhibit 1, BCW Record, May 12, 1970

36. Exhibit 1, BCW Record, May 12, 1970

37. Exhibit 1, BCW Record, May 12, 1970

38. Exhibit 1, BCW Record, May 12, 1970

39. Exhibit 6, Foundling Hospital Record, May 8, 1970
Exhibit 1, BCW Record, May 15, 1970

40. Exhibit 6, Foundling Hospital Record, May 8, 1970

41. Exhibit 1, BCW Record, May 15, 1970

FOOTNOTES TO STATEMENT OF FACTS - Con'd.

42. Exhibit 1, BCW Record, May 15, 1970

43. Exhibit 1, BCW Record, May 15, 1970

44. Exhibit 1, BCW Record, May 15, 1970

45. Exhibit 6, Foundling Hospital Record

46. Exhibit 5, St. Joseph's Record, June 15, 1970

47. Exhibit 6, Foundling Hospital Record, May 21, 1970
Exhibit 5, St. Joseph's Record, June 9, 1970

48. Exhibit 5, St. Joseph's Record, June 9, 1970

49. Exhibit 6, Foundling Hospital Record, May 21, 1970

50. Exhibit 5, St. Joseph's Record, June 9, 1970

51. Exhibit 5, St. Joseph's Record, Summary of Child Contacts, 5/70 - 6/70

52. Statement, p. 11, ¶8
Exhibit 5, St. Joseph's Record, Summary of Child Contacts, 8/70 - 12/70
Exhibit 5, St. Joseph's Record, Summary of Family Contacts, 8/11 - 12/22/70

53. Exhibit 6, Foundling Hospital Record, June 23, 1970

54. Exhibit 6, Foundling Hospital Record, June 23, 1970

55. Exhibit 5, St. Joseph's Record, July 9, 1970

56. Statement, p. 11, ¶9

57. Statement, p. 11, ¶9

58. Exhibit 3, Bellevue Record, Continuation Record, 11/2/70

59. Exhibit 6, Foundling Hospital Record, June 17, 1971

60. Exhibit 6, Foundling Hospital Record, September 13, 1971

61. Exhibit 6, Foundling Hospital Record, September 12, 1971

62. Exhibit 5, St. Joseph's Record, Summary, September 24, 1971

FOOTNOTES TO STATEMENT OF FACTS - Con'd.

63. Statement, p. 19, ¶9
Exhibit 6, Foundling Hospital Record, October 18, 1971

64. Statement, p. 19, ¶9

65. Statement, p. 19, ¶9
Exhibit 6, Foundling Hospital Record, October 18, 1971

66. Exhibit 6, Foundling Hospital Record, January 13, 1972

67. Exhibit 6, Foundling Hospital Record, November 3, 1971

68. Exhibit 6, Foundling Hospital Record, November 8, 1971

69. Exhibit 6, Foundling Hospital Record, November 8, 1971

70. Exhibit 5, St. Joseph's Records, November 11, 1971

71. Exhibit 3, Bellevue Records, Continuation Record, November 11, 1971

72. Exhibit 6, Foundling Record, November 10, 11, 1971; December 27, 1971
Exhibit 5, St. Joseph's Record, December 27, 30, 1971; January 5, 1972

73. Exhibit 5, St. Joseph's Record, December 27-December 30 - January 5, 1972
Exhibit 1, BCW Record, December 28, 1971

74. Exhibit 1, BCW Record, November 17, 1971, November 19, 1971

75. Exhibit 6, Foundling Hospital Record, March 2, 1972
Exhibit 5, St. Joseph's Record, March 3, 1972

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LISA H. BLITMAN, being duly sworn deposes and says:

I am over the age of 18 years and I reside at 24 West 87th Street New York, New York.

On February 4, 1977 I personally served Appellants' Brief and Appendix on Ferderick J. Magoovern, Esq., attorney for defendants by leaving a copy at his office at 102 East 35th Street, New York New York.

On February 7, 1977 I personally served Appenllants Brief and Appendix on New York City Corporation Counsel, Municipal Building, New York , New York

Lisa H. Blitman

Sworn to before me this
7 day of February, 1977

Notary Public In the State of New York
Cayuga County
My Commission Expires